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31 October 1997

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Comments of Fordham University
In MM Docket No. 97-182

Dear Mr. Caton:

On October 30, 1997, Fordham University, licensee of Station WFUV(FM), Bronx, New York, filed its Comments in the Commission's rulemaking proceeding, MM Docket No. 97-182, concerning preemption of state and local zoning and land use restrictions on the siting, placement and construction of broadcast station transmission facilities. An Attachment referenced in those Comments was inadvertently omitted. Fordham is accordingly resubmitting its Comments with the Attachment appended.

Very truly yours,

Katrina Renouf
Counsel for Fordham University

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Preemption of State and Local	)	
Zoning and Land Use Restrictions	)	MM Docket No. 97-182
on the Siting, Placement and	)	
Construction of Broadcast Station	)	
Transmission Facilities	)	

To: The Commission

COMMENTS OF FORDHAM UNIVERSITY

Fordham's Interest in the Proceeding

1. Fordham University is the licensee of FM Station WFUV-FM, Bronx, New York, a noncommercial station which the University has operated on the campus for over 50 years. Because of intractable RF radiation problems from the present site atop a campus classroom building and in order to improve facilities and coverage, including service to a substantial noncommercial white area, the station is in the process of relocating its transmitter and antenna on the University campus.[1/]

1/ Fordham filed its facilities modification application in 1983 (BPED-831118AL). However, due to the heavy demand for noncommercial spectrum space in the New York City area, the application became part of a spectrum allocations proceeding involving nine stations and nine years. *See* ***Letter to Fordham University,*** reference no. 1800B3-AJA (Chief Audio Services Division, September 30, 1992. It was not until the technical hurdles at the FCC were cleared that the University then faced the formidable local zoning and land use proceedings in which it is still, years later, enmeshed.

2. The Commission granted a construction permit for the proposed new facilities on December 7, 1992 (BPED-831118AL) and a local building permit was issued on March 1, 1994, but actual construction was halted by the New York City Commissioner of Buildings in June 1994, after the 480' tower had been half completed, in response to a local zoning challenge from the neighboring New York Botanical Garden, which objected to the tower on aesthetic grounds.[2/] Since 1994 the tower has remained in its half built 250' state while the Botanical Garden's consistently unsuccessful appeals of an initial zoning ruling favorable to the project work their way through the local and state appeals process; the case has now reached the New York State Court of Appeals, with no end in sight and with the new service approved by the Commission precluded by this wholly local dispute.

The Notice of Proposed Rulemaking

3. By *Notice of Proposed Rulemaking* (*NPRM*) released August 19, 1997, the Commission requests comments on "whether and under what circumstances to preempt certain state and local zoning and land use ordinances which

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2/ Federal environmental and historic preservation claims by the Botanical Garden are also under consideration at the Commission, but those claims do not bear on the subjects under consideration in this rulemaking proceeding.

present an obstacle to the rapid implementation of digital television ('DTV') service." *NPRM*, para. 1. The proceeding was initiated by petition of the National Association of Broadcasters (NAB) and the Association of Maximum Service Telecasters (AMST). Petitioners seek a rule which would impose "time limits on state and local government action in response to requests for approval of the placement, construction or modification of broadcast transmission facilities." *NPRM*, para. 6. If relevant authorities fail to act within specified time limits, requests for action would "be deemed granted." *Id.*

4. The proposed rule would also categorically preempt certain categories of regulations, including those "based on the environmental or health effects of radio frequency ('RF') emissions" by proposals meeting Commission requirements; interference by proposals meeting all applicable Commission requirements; and tower marking and lighting requirements, subject to the same proviso. *Id.* "Further, the rule would preempt all state and local land use, building, and similar laws, rules or regulations that impair the ability of licensed broadcasters to place, construct or modify their transmission facilities unless the promulgating authority can demonstrate that the regulation is reasonable in relation to a clearly

defined and expressly stated health or safety objective other than the categorical preemptions described above." *NPRM*, para 8.

5. While initiated in response to perceived impediments to construction of HDTV facilities and the problems of co-located FM stations forced to move or construct new facilities by virtue of the "increased weight and wind loading of DTV facilities and other tower constraints", *NPRM*, para. 3, the proceeding also seeks to determine whether the suggested preemption should extend beyond such facilities to govern all broadcast facilities or at least all those in the top markets, *NPRM*, para 21; whether it should be restricted to RF problems or extend to other categories of state and local regulation of siting and construction of transmission facilities, *NPRM*, paras 21-22; and whether federal regulation should "preempt local regulation intended for aesthetic purposes," *NPRM*, para 22. The *NPRM* generally invites comment "on the Petitioners' proposals for the preemption of state and local laws, regulations and restrictions on the siting of broadcast transmission facilities" and seeks "a detailed record on the nature and scope of broadcast tower siting issues, including delays and related matters encountered by broadcasters" and others, with particular

emphasis on "experiences related to obstacles and time constraints or delays encountered . . . in the top 30 markets." *NPRM*, paras. 18-19.

The Commission's Authority

6. The Commission's authority to preempt local regulations stems from Section 1 of the Act, directing the agency to assure "to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges," as it recently had occasion to observe in the context of satellite earth stations. ***Report and Order and Notice of Proposed Rule-making: Preemption of Local Zoning Regulation of Satellite Earth Stations***, FCC 96-78, 2 Communications Reg. (P&F) 723 (1996). As the Commission observed in that context, "[a] Commission rule that facilitates access to communications services . . . is a means by which to promote that objective." ***Ibid.***, at 727.

7. Notwithstanding "the local interest in this area," the Commission observed in the ***Satellite Report and Order*** that in approaching the preemption question, "the focus must be the effect on the federal interest and the appropriate accommodation of the local interests involved" and preemption cannot be precluded simply because

of the traditionally local nature of zoning. ***Id.*** The federal interest to be protected in any context is "ensuring that the American people . . . have wide access to all available technologies and information services. If nonfederal regulations are acting as obstacles to this federal interest, they are subject to preemption." ***Ibid.***, at 728.

8. As the ***Satellite Report and Order*** observes, ***Ibid.***, at 726, the Supreme Court has on multiple occasions confirmed and defined the appropriate preemptive authority of the federal government over nonfederal regulations. It is settled law that such "regulations have no less preemptive effect than federal statutes." ***Fidelity Federal Savings & Loan Association v. De La Cuesta***, 458 U.S. 141, 153 (1982). "Thus, the Commission may preempt nonfederal zoning regulations when the nonfederal body 'has created an obstacle to the accomplishment and execution of the full purposes and objectives' of the Commission acting within its congressionally delegated authority." ***Satellite Report and Order***, *supra*, at 726 (quoting from ***Fidelity***, *supra*, 458 U.S. 141, 156).

9. In the case of public broadcasters like Fordham, the federal purposes and objectives have found very clear statutory expression. Section 396 of the Act, 47

U.S.C. § 396(a), setting up the Corporation for Public Broadcasting, for example, contains a "Congressional declaration of policy," which specifically "finds and declares that . . . it is in the public interest to encourage the growth and development of public radio and television broadcasting"; that "the encouragement and support of public telecommunications, while matters of importance for private and local development, are also of appropriate and important concern to the Federal Government"; and that "it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States."

10. And in providing for federal matching grants to public broadcasters, Section 390 of the Act, 47 U.S.C. § 390, declares it to be the purpose of such funding to "extend delivery of public telecommunications services to as many citizens of the United States as possible by the most efficient and economical means." Section 393, 47 U.S.C. § 393, specifies the criteria for approving such grants and for determining their size, as:

> (1) provision of new telecommunications facilities to extend service to areas currently not receiving public telecommunications services;

> (2) the expansion of the service areas of existing public telecommunications entities;
>
> (3) the development of public telecommunications facilities owned by, operated by, and available to minorities and women; and
>
> (4) the improvement of the capabilities of existing public broadcast stations to provide public telecommunications services.

Fordham's current facilities improvement project has been the beneficiary of such federal construction funding.

Local Delays and Obstacles to Fordham's Construction

11. Fordham's experience in attempting to construct its authorized facility bears directly on the *NPRM's* intent to build a detailed record on the question of delays and obstacles to construction encountered by broadcasters, especially in the top 30 markets. In Fordham's case, local zoning processes remained available to a single opponent of its proposal, the New York Botanical Garden (NYBG) even well after commencement of construction, construction which had been fully authorized by both the Commission and the New York City Department of Buildings. Those processes have now been used to delay a federally authorized service for some three and a half years,[3/] with at least another half year of delay certain

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3/ While in Fordham's case the complaining party also implicated the federal environmental and historic preservation laws, the delay factor would have been the same if only the local zoning and land use regulations had been raised.

to ensue before completion of the currently pending appeal.

12. On February 17, 1993, Fordham University filed a New Building application with the New York City Department of Buildings (DOB), describing its proposed transmitter building and tower, disclosing the height of the tower and describing both as uses accessory to the University. On March 1, 1994, the plans were approved and after renewal of the permit on May 13, 1994, construction began in June of that year.

13. When the tower had reached 250 feet, a neighboring institution, the New York Botanical Garden, filed a complaint with the Commissioner of Buildings, asking that construction be halted pending consideration of two objections: 1) that the tower should not have been deemed a permitted obstruction in the "sky exposure plane", a matter which had been raised by the DOB plans examiner at the outset and fully considered and rejected in favour of a ruling that it was an aerial and therefore a permitted obstruction; and 2) that the tower was not an accessory use on the campus. Construction was halted as requested.

14. Extensive written documentation was prepared by the University and submitted on July 19 and 25, 1994. On

September 12, 1994, the Commissioner ruled that the tower was a proper accessory use.[4/] On December 6, 1994, NYBG appealed the accessory use determination to the Board of Standards and Appeals (Cal. No. 194-94-A). Public hearings were held before the BSA on March 14 and May 9, 1995. On June 14, 1995, the BSA ruled unanimously in Fordham's favour.

15. On July 13, 1995, NYBG appealed to the Supreme Court of the State of New York. That appeal too was denied, in the June 10, 1996 opinion which is Attachment 1 hereto and which characterized NYBG's contentions as largely "extraneous" (Attachment 1, page 3) and devoid of any claim of "significant economic harm" or any suggestion "that the tower will bring about some undesirable change in the character of the neighborhood, a neighborhood in which Fordham University has been located since 1845" (*Ibid.*, at page 5).

4/ On September 27, the Commissioner ruled against Fordham on the sky exposure plane question. Fordham appealed to the New York City Board of Standards and Appeals (BSA). Simultaneous with its appeal, Fordham took another action which essentially mooted the sky exposure plane issue, although the University also pursued its appeal: Fordham sought and received approval to construct at the proposed height of 480 feet at a location 25 feet farther back from the property line so that it would fully comply with the sky exposure plane requirements.

16. The decision also observed that "[t]echnically, at least, laches should serve as a bar to the Petition," which was in any case defeated by "other and more traditional and forceful reasons," *Ibid.*, at page 8, chief among them being the University's need for the new antenna to provide its licensed service and the condition of the old structure, *Ibid.*, at pages 8-9. Finally, the opinion noted that "Operation of the station and its antenna was proper before the construction of a new tower antenna was begun and there is no diminution of accessory use simply because of a relocation of the antenna and at a height that will give practical existence and reach to the station's signal." *Ibid.*, at page 9.

17. That opinion was summarily upheld by the Supreme Court, Appellate Division, First Department, on April 15, 1997. On September 16, 1997, NYBG was granted leave to appeal to the New York State Court of Appeals. Briefing should take approximately 5 months, with oral argument to be scheduled thereafter and a decision to follow. Throughout these proceedings and those still to come, Fordham has remained unable to construct the new tower for which it received a construction permit almost five years ago.

18. The *NPRM* seeks data on both delays and impediments to construction posed by local regulation. In the case of public broadcasters like WFUV, the cost of such protracted local disputes can become an even greater factor than the delay itself. For any broadcaster, deferral of construction of improved facilities involves in the first instance the adverse economic consequences of not providing the new service, whether in the form of lost profits or, in the case of the noncommercial broadcaster, reduced contributions resulting from a truncated audience. But for the public broadcaster the out of pocket cost of local proceedings can be an almost preclusive factor. In Fordham's case the local proceedings subsequent to receipt of the initial building permit (exclusive of the costs related to federal objections lodged by the same complainant) have already engendered direct out of pocket costs of approximately $160,000

The Appropriate Role of Preemption in such Circumstances

19. The problems posed by local zoning and land use ordinances to rapid implementation of DTV were the immediate impetus behind the Petition leading to this proceeding. However, the *NPRM* also notes that such regulations may "stand as an obstacle to the institution and improvement of radio and television broadcast service

generally." *Report and Order, supra*, para. 1. It is Fordham's experience that they do in fact stand as such an obstacle and it is that aspect of the *NPRM* to which these comments are addressed.

20. As an initial matter, it does not appear that there is any basis for limiting the scope-- and the benefits-- of any preemption solely to those FM broadcasters who are fortuitously in the position of being colocated on the towers of television stations which may have to relocate to implement DTV, when real and demonstrable damage is already being caused to other categories of broadcasters, as evidenced by Fordham's experience. Certainly, as already noted, there is an existing and explicit federal statutory policy encouraging the speedy implementation of such noncommercial facilities improvements as Fordham's, a policy which is directly thwarted by the years of delay in implementation of Fordham's new service through the adversarial use of local regulations. Moreover, in the case of noncommercial broadcasters, the economic cost of fighting such endless local battles may ultimately become so high as not simply to delay but to defeat or preclude the initiation of any locally controversial facilities improvement project.

21. The *NPRM* suggests (para. 16) that the plenitude of existing telecommunications facilities might evidence that nonfederal regulations have not presented an actionable obstacle to institution of new and expanded services. However, the Commission has already rejected such a rationale in the cable and satellite contexts, as noted in the ***Satellite Report and Order***, *supra*, at 727. And as a practical matter, Fordham's experience makes clear the fact that at least in large markets and crowded cities like New York, where non-controversial sites are at a premium, such local regulations can present almost insuperable obstacles and almost invariably cause inordinate delays.

22. On the important question of whether preemption should be substantive or procedural, matters would appear to fall into two categories: those in which the primary or exclusive interest is federal (or in which the local interest is essentially coextensive with the federal interest) and the Commission has regulations; and those which are in their nature essentially local or at least have a significant local component. As the *NPRM* notes (at paragraph 7), the first category includes such things as "the environmental or health effects of radio frequency ('RF') radiation . . . ; interference with other

telecommunications signals and consumer electronic devices . . . ; and tower marking and lighting requirements." In such cases Fordham suggests that preemption would appear both appropriate and wise. Not only would it avoid duplication of effort and unnecessary expenditure of time, but it would also ensure consistent standards for dealing with problems whose impact does not vary from place to place.

23. In the case of matters with a significant local component, however, Fordham believes that both common sense and its own experience suggest the wisdom of procedural preemption-- placing time rather than subject matter limitations on local action. The *NPRM* suggests the possibility, *inter alia*, of preempting aesthetic questions, and aesthetic questions do raise thorny problems. Indeed, they have formed the substantive basis for the endless delay in Fordham's case, as noted in the opinion of the New York Supreme Court.[5/] However, even in that situation, it may be that the same result can be achieved without displacing local authorities because the real problem appears to be less the subject matter of local complaints than the amount of time involved in the local consideration process itself. In Fordham's case, for

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5/ See Attachment 1, the opinion of Sheila Abdus-Salaam, J., at pages 2-3, 8.

example, several years have already passed and the process is not yet at an end, even though the University has prevailed on the central issue at every stage.

24. The mere availability of local processes not subject to any kind of federally imposed time limit also appears to make it possible for opponents of an application found by the Commission to be in the public interest to hold it hostage indefinitely for entirely private reasons which do not have a public interest component, either local or federal. It is a simple matter to couch an objection in whatever substantive guise is not subject to preemption; and while ultimate victory may lie with the challenged broadcaster in such a case, the delay and the cost are the same for an unsuccessful objection.[6/]

25. Moreover, attempting to choose appropriate subject matter for federal preemption of nonfederal regulation in subject areas of independent local concern would appear to raise complex and possibly unnecessary problems. In the case of matters such as aesthetics, local land values or impact on neighborhoods, both the optimal substantive standards for evaluating the impact of a

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6/ Thus, for example, in its federal environmental challenge to Fordham's tower, NYBG purported to raise an economic objection by contending that the aesthetic inadequacies of Fordham's tower would so offend potential donors to the Botanical Garden that its charitable donations would be diminished.

broadcast proposal and the value placed on such matters in the first place will probably vary from locale to locale.

26. There may well be instances in which it is not possible to permit untrammeled local authority because it would defeat the federal purpose-- as, for example, if the City of New York were simply to rule broadcast towers an unacceptable land use. However, unless this proceeding provides evidence of such a preclusive use of local authority, Fordham suggests that the federal interest could be as well protected with a great deal less complexity by simply adopting the Petitioners' suggestion of a time limit for local consideration after the expiration of which a proposal will be presumptively acceptable under the relevant nonfederal regulations.

27. How much time is appropriate is necessarily a question involving an appropriate balance between the federal interest in expedition and the local interest in reasoned decision making. The Petitioners have suggested a 30 day period. Fordham believes that those with a broader perspective than a single broadcaster are better situated to determine precisely how much time would reasonably accommodate the real world problems of local authorities attempting to give thoughtful consideration to

the matters before them without unduly impeding achievement of the overriding federal purpose. While too long a period would defeat the entire purpose of the preemption, too short a period amounts to an across the board subject matter preemption, since it effectively disallows meaningful local action. From the perspective of the individual broadcaster seeking to build or improve facilities, the most critical matter is that there be a time certain on which reliance can be placed.

CONCLUSION

Fordham University believes on the basis of its own experience in attempting a facilities upgrade that the Commission would be wise to preempt nonfederal regulations not only as to television broadcasters initiating DTV service but as to all broadcasters seeking to situate new or improved facilities; that it should undertake such preemption by subject matter in those areas in which it has existing rules and policies; and that it should preempt only to the extent of setting time limits for nonfederal consideration in all other areas, after the expiration of which local approval will be presumed.

Respectfully submitted,

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30 October 1997

ATTACHMENT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of	Index No. 117371/95
THE NEW YORK BOTANICAL GARDEN,	IAS PART 13
Petitioner,	DECISION
For a Judgment Pursuant to CPLR Article 78,	
-against-	
BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK,	
Respondent.	
-and-	
FORDHAM UNIVERSITY,	
Intervenor-Respondent.	

SHEILA ABDUS-SALAAM, J.

Petitioner moves pursuant to Article 78, CPLR, for judgment "annulling and setting aside" a determination by Respondent that upheld a determination by the New York City Commissioner of the Department of Buildings dated September 27, 1994. That determination, now the subject of this certiorari proceeding, was affirmed by Respondent on June 13, 1995.

Fordham University has intervened as a respondent since the determination will have a direct impact upon the University and its operation of its FM campus radio station, WFUV.

A brief description of the background facts is necessary.

For many years, Fordham University has operated its radio station as an integral part of its education mission. The station

is non-commercial and is located on the Rose Hill campus of the University. Fordham applied to the City of New York for permission to construct a new radio tower and antenna to replace an existing one that has been on the campus throughout the life of the station. Petitioner opposed the proposed construction. The Department of Buildings determined that Petitioner's objections were without merit. Petitioner appealed to Respondent and Respondent upheld the determination.

Petitioner now comes to this court contending that the ruling by Respondent must be annulled. Despite the many pages in the voluminous record and exhibits before the court and the competing and impassioned arguments, the focus of this dispute between neighboring institutions, must be on whether or not there is substantial evidence to support the determination appealed from; and, if not, whether Respondent acted in some arbitrary or capricious manner affronting administrative due process, based on the entire record, when Respondent concluded that the proposed replacement antenna tower was a permitted accessory use of Fordham's property.

Two administrative agencies have reviewed the opposed arguments and contentions of the parties. Every contention has been developed and parsed extensively. Central to Fordham's position is that the construction of the antenna tower is no more than accessory use of its University property.

One of Petitioner's core arguments appears to be the proposed 480 feet height of the tower when completed. A close look at

Petitioner's objections reveals adjectival descriptions that fall under the rubric of aesthetics. For example, the proposed tower is envisioned as a "lanky eyesore." A press mention describes the parties as "Battling Neighbors," calling the unbuilt tower "ungainly" and a "gigantic skeleton" in "reckless disregard of esthetics." One description also reviled the tower as the product of an "Erector" set.

Many of the contentions advanced appear to be extraneous and seem to stray from the issue of whether or not Respondent's conclusions are supported by the evidence, or are vulnerable to annulment because they are arbitrary and capricious. Fordham is consistent in clinging to its main argument that it is entitled to construct the tower on its own property on the theory that under New York City's Zoning Resolution, the tower is no more than an "accessory use", accessory to the tower site's principal use as an educational institution. Petitioner argues that the heights of the tower (and the 480 foot height appears to be the most urgent objection of Petitioner) removes it from the category of "accessory use". For example, counsel to Petitioner says that "the size of the tower necessarily is relevant to the determination of whether it truly is 'accessory' to the campus". Since the original tower atop a building on the campus never generated any cited objections, it becomes clear that Petitioner is deeply offended by the height of the proposed tower, an item that was disclosed by Fordham from the outset. Still, Petitioner waited until the tower was well under construction before seeking to halt the project.

Does Respondent's approval of the proposed tower result in conduct that is arbitrary and capricious? After all, the members of Respondent are, as is required, professionals in their respective fields of engineering and construction. Their analysis and judgment are entitled to great judicial respect and the courts must always be careful not to substitute their own concerns for those of an administrative agency, unless the nullifying elements, arbitrariness and capaciousness, are evident. In this connection, see Matter of Levada v. Board of Zoning and Appeals, 199 A.D. 2d 504, 505, for a long-honored them that:

> A zoning board's decision will be sustained if it has a rational basis and is supported by substantial evidence (see Matter of Fuhst v. Foley, 45 N.Y. 2d 441; Consolidated Edison Co. v. Hoffman, 43 N.Y 2d 598.)

There can be no valid complaint about Petitioner having notice of Fordham's proposed tower. One is required to give "due notice" of the nature of the application, so that the administrative agency can make an informed determination. Here, it would seem, as in Matter of Burke v. Village of Colonie Zoning Board, 199 A.D. 2d 611, 612 the Respondent's "determination constituted an exercise of discretion that cannot be set aside in the absence of illegality, arbitrariness or abuse of discretion * * * and judicial review of the determination is 'subject to the limitation that courts may not interfere with decisions enjoying a rational basis, supported by substantial evidence in the record (Matter of Doyle v. Amster, 79 N.Y. 2d 592, 596).'"; Matter of Keller v. Haller, N.Y.L.J., April 26, 1996, p. 32, col. 3.